United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 12, 1996

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Beverly Health and Rehabilitation, Inc.
Case 6-CA-27453

512-5012-6722
512-5030-4000
512-5060-2500
512-5072-1600
512-5072-4200

This case was submitted for advice on whether (1) the Employer unlawfully promulgated two rules (a) requiring employee cooperation in investigations of patient neglect; and (b) prohibiting employees from making false or misleading work related statements; and (2) the Employer unlawfully mailed employees letters detailing the employees' right to resign and become proportionate fee payers.

The Employer owns 19 unionized facilities in Pennsylvania. In all but two of these facilities, the bargaining agreements are set to expire on November 30, 1995. In early 1995, the Employer promulgated a new set of disciplinary rules to be implemented nationwide. Many of the Employer's unrepresented facilities implemented these rules around that time. In April 1995, the Employer sent the new rules to the Union for implementation at the Union represented facilities as of June 1.

Under new rule 1.4, employees are subject to suspension, pending investigation for discharge, for:

Refusing to cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation of company rules, laws, or government regulations.

The Union asked the Employer if this rule applied to situations involving the NLRB, or if it was intended to

eliminate the employees' right to a Union representative during an interview that might lead to discipline.[1] In August, the Employer responded that the rule did not apply to unit employees in matters involving the Board, and also did not apply to disciplinary interviews where unit employees have a right to union representation. There is no evidence that the Employer conveyed its limiting interpretation directly to unit employees.

Under new rule 1.6, employees are subject to suspension, pending investigation for discharge, for:

Making false or misleading work-related statements concerning the company, the facility, or fellow associates.

The Union asked the Employer what it meant by "misleading work-related statements." In August, the Employer responded that the prohibition included but was not limited to "unprotected statements about the care given to a resident."

In the spring and summer of 1995, the Employer sent letters to employees at several represented facilities. The letters varied in precise wording but generally began by criticizing the Union in some way. The letters then went on to explain that employees had the right to resign from the Union and become proportionate fee payers. The Employer did note in the letters that the decision to resign was the employees alone to make; that there would be no difference in wages or other treatment by the Employer; that the Employer was not urging either choice; and that neither the Employer nor the Union could interfere with the employees' right to choose. To the letters the Employer attached forms which employees could use to resign, could use to make objections under Beck,[2] and to request Beck financial information from the Union. There is no evidence that these letters were in response to prior inquiries from employee.

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[1] See NLRB v. J. Weingarten, Inc., 429 U.S. 251 (1975).

[2] CWA v. Beck, 487 U.S. 735 (1988).

We conclude that rules 1.4 and 1.6 are unlawfully overbroad, and that the letters are an unlawful interference with the employees' right to choose full representation.

Concerning rule 1.4, the Board has held that an employer can lawfully "compel employees to submit to questioning concerning employee misconduct when the employer's inquiry is still in the investigative stage and no final disciplinary action has been taken."[3] We conclude Rule 1.4 is impermissibly overbroad because it is not confined to inquiries "still in the investigative stage", nor to inquires where "no final disciplinary action has been taken." Under this rule, employees may reasonably believe that they must cooperate with investigations even after the Employer has already decided to impose discipline.

Concerning rule 1.6 against making false or misleading statements, we conclude, in agreement with the Region, that this rule is unlawfully overbroad. The Board has found that a rule prohibiting even "false, vicious or malicious statements about any employee, the Company or its products" was a per se violation because the rule failed to clearly define the areas of permissible conduct.[4] The instant rule, prohibiting "false" or "misleading" work related statements is similarly overbroad and unlawful.

Finally, we conclude that the Employer's various letters unlawfully restrained employees in the exercise of their right to decide whether to become Beck objectors. Research uncovered no cases involving an employer's alleged interference with this employee right. Where employers have attempted to inform employees of their right to resign, the Board has allowed the furnishing of resignation language to employees including the providing of envelopes with the union's address. The Board has found unlawful inducements to resign only where employers have made promises of benefit, threats of reprisal, or have otherwise

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[3] See Cook, Paint and Varnish Co., 246 NLRB 646 (1979).

[4] See Stanley Furniture Company, 271 NLRB 703, 704 (1984).

so interjected themselves into the process as to have taken command of the situation.[5]

In the above cases, the employees' right to resign often arose in strike situations where employees were questioning their ability to continue working.[6] In these and other situations, viz., a picket line around the employer, an employee's membership or nonmembership may well directly impact upon his or her ability to continue his or her employment. The instant situation, involving Beck status rather than membership, is clearly distinguishable for two reasons.

First, unlike the initial choice to become a member or nonmember, an employee-nonmember's additional decision to also become a Beck objector has no consequent impact upon his or her employment. Thus, the Employer provision of information on how to achieve Beck status is more clearly an intrusion into internal union membership without any justification.

Second, where a new employee is a nonmember, or a current employee-member resigns his or her membership, the representative union is under an obligation to inform such nonmembers of their rights to become proportionate fee payers under Beck. And if such nonmembers do become Beck objectors, the union is under an obligation to provide the appropriate Beck financial information.[7] Thus, although

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[5] See, e.g., Nordstrom Inc., 229 NLRB 601 (1977); Towne Plaza Hotel, 258 NLRB 69. Compare Cumberland Shoe Co., 160 NLRB 256 (1966) with Clark Control Div., 166 NLRB 266 (1967). Recently in American Linen Supply Co., 297 NLRB 137 (1989), the Board found that an employer provided unlawful "aid and support to employees in the filing of withdrawal cards" where the employer furnished employees with printed withdrawal forms, made notary publics available, and then mailed the withdrawal forms to the union.

[6] Compare Mosher Steel Co., 220 NLRB 336 (1975)(no violation in strike situation) with Cumberland Shoe, supra (violation in organizing campaign situation).

[7] See G.C. Beck Guidelines.

employees are not apprised by their representative union of their right to resign, nonmember employees are fully apprised by their union of their Beck rights.

We thus would argue that the Employer's conduct here amounted to unlawful interference because the provision of employee rights under Beck duplicates the same information which will be and must be provided by the incumbent union. The employer's information therefore amounts to an employer endorsement of Beck objector status. In other words, an employee receiving duplicative information from the employer will reasonably conclude that the employer can not be merely informing the employee about his or her Beck rights, but instead is encouraging the employee to attain that status. In this regard, all the above cases involving the provision of information of only the right to resign clearly are distinguishable.

In this particular case, the Employer provided on at least some of the forms a place for employees to further request Beck financial information. The Employer also timed its information endorsing Beck status to occur at the end of the term of the existing bargaining agreement when the Union most needed full member strength to enforce its bargaining demands. Thus, the Employer's conduct in these circumstances particularly amounted to unlawful interference.[8]

In sum, the Region should argue that the rules are unlawful as overly broad, and the Employer's letters providing information unlawfully interfered with Section 7 rights to the extent that they provided information on how to obtain Beck objector status and request Beck financial information.

B.J.K.

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[8] Compare Cumberland Shoe, supra, finding a violation in part because the employer provided information about resignation during an organizing campaign.